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No. 85-682

In The
Supreme Court of the United States
October Term, 1985

GERALD D. BAIR, DIRECTOR OF THE DEPARTMENT OF REVENUE OF IOWA,
Petitioner,

vs.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY,
Respondents.

BRIEF OF THE STATES OF NORTH DAKOTA, SOUTH DAKOTA, UTAH AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 36.1, the signatory states submit this Brief as *Amici Curiae* in support of the Petition for a Writ of Certiorari. Since this Brief is being sponsored and filed by the aforementioned states, consent to its filing is not required. United States Supreme Court Rule 36.4.

II. OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Trailer Train Company, Railbox Company and Railgon Company v. Bair*, 765 F.2d 744 (8th Cir. 1985).

III. INTEREST OF AMICI CURIAE

The interests of the states joined as Amici in this Brief concern what they believe to be the far reaching effects of the opinion of the Court of Appeals as it relates to implication of state excise taxes under 49 U.S.C. § 11503 and to state excise taxation of nonrail carriers. In addition, the states believe that the Court of Appeals misapplied § 11503 which creates a narrow federal court jurisdictional exception to the Tax Injunction Act, 28 U.S.C. § 1341. Such jurisdictional exception can only apply to state property taxes in a limited context, and not to state excise taxes.

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IV. ARGUMENT

The question of whether § 306(1) (d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), codified as 49 U.S.C. § 11503(b) (4), implicates state excise taxes, is of great import to the states. If such implication exists, states must re-examine their excise tax laws to ascertain whether those taxes need restructuring to remove perceived differential tax treatment. Such state excise taxes would include those reasonable forms of taxation, historically and commonly in effect, such as income taxes, sales and use taxes, business license taxes, and gross receipts taxes.

It is unclear from the provisions of § 306 of the 4-R Act whether state excise taxes are implicated. With the exception of the "any other tax" language, § 306 only expressly addresses property taxes. The § 306(3) definitions

concern only property taxes. Prohibited tax schemes in § 306(1) (a) - (c) only implicate property taxes. Express Federal District Court jurisdiction is conferred in § 306(2) for discretionary property taxes. Section 306(2) (c) authorizes use of sales assessment ratio studies, a technique only applicable to and relevant for property taxes. The class to be used for discriminatory tax comparison purposes is commercial and industrial property. No express class is set forth in § 306 to make a comparison for discriminatory excise tax purposes. Within the property tax context of § 306, the use of three words "any other tax" in § 306(1) (d) does not indicate a congressional intent to include state excise taxes within the scope of the statute.

The 4-R Act's legislative history indicates that Congress was addressing discriminatory property taxes only. The Senate Conference Report, in commenting upon the scope of § 306, stated the Congressional intent was to limit "the provision to taxation of railroad property." 2 U.S. *Code Cong. & Ad. News,* 148, 181. Such a statement would include property taxation of property used in the operation of a railroad, whether owned by a rail carrier or, as in Respondents' situation, owned by nonrail carriers. Such a statement would not, however, show an intent to implicate excise taxes, whether imposed on rail carriers or nonrail carriers.

This Court has not addressed the question of whether the 4-R Act implicates state excise taxes. This Court can now address this issue and provide guidance to the states in structuring their excise taxes.

Even if state excise taxes are implicated in § 306(1) (d), the Court of Appeals disregarded the clear language

of that subsection which only proscribes discriminatory state taxation against rail carriers. Respondents are not rail carriers. If the "any other tax" language in the statute is clear and unambiguous as the Court of Appeals suggests, then surely it is equally clear that the language "results in discriminatory treatment of a common carrier by railroad" is unambiguous and proscribes only differential taxation imposed on rail carriers, and not on those who have a business relationship, as do Respondents, with rail carriers. The Court of Appeals, thus, erred in extending the scope of § 306(1) (d) to include nonrail carriers.

Whether nonrail carriers are included within the ambit of § 306(1) (d) is the subject of conflict in the lower courts. In *Trailer Train Co. v. State Board of Equalization*, 538 F. Supp. 509 (N.D. Cal. 1982), the Court held that a nonrail carrier could not invoke the provisions of § 306(1) (d). In *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468 (8th Cir. 1983) and in the instant case, the Eighth Circuit Court of Appeals held that § 306(1) (d) could be invoked by nonrail carriers. This Court should resolve this conflict in the lower courts.

Finally, the Eighth Circuit Court of Appeals' expansive interpretation of § 306(2) simply disregards the unambiguous language in that provision that a federal district court cannot grant any relief whatsoever "unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 percentum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction." This clear language precludes federal district court jurisdiction over state excise

taxes under a 4-R Act discrimination claim and such claims should be heard in a state court. The states have a vital interest in the scope of their court jurisdiction or whether that jurisdiction has been eroded by the 4-R Act and, if so, the extent of such erosion.

V. CONCLUSION

The Petition raises questions of great concern to the Amici states and presents important questions which this Court should address. Therefore, we urge this Court to grant the Petition for a Writ of Certiorari in the present case and give plenary consideration to the matter.

Respectfully submitted,

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